

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-32607

JOHN DALE JAMISON

Debtor

STERLING P. OWEN, IV, TRUSTEE

Plaintiff

v.

Adv. Proc. No. 02-3133

JOHN DALE JAMISON,  
WILLIAM R. BRANNICK, TRUSTEE,  
and DANIEL O'KEEFE, TRUSTEE

Defendants

**MEMORANDUM ON MOTION TO DISMISS**

**APPEARANCES:** BAILEY, ROBERTS & BAILEY, P.L.L.C.  
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**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

The Debtor commenced his bankruptcy case on May 23, 2001, by the filing of a Voluntary Petition under Chapter 7. The Plaintiff was thereafter appointed Trustee. This adversary proceeding was initiated by the Plaintiff on July 25, 2002, seeking to recover postpetition income payments received by the Debtor from three spendthrift trusts (collectively, the Trusts) of which the Debtor is the beneficiary. In his Complaint, the Plaintiff alleges that the income received by the Debtor from these Trusts is property of the bankruptcy estate pursuant to 11 U.S.C.A. § 541(a) (West 1993). As such, the Plaintiff avers that he is entitled to recover the payments pursuant to 11 U.S.C.A. § 542 (West 1993) and 11 U.S.C.A. § 543 (West 1993).<sup>1</sup>

The Debtor filed a Motion to Dismiss on September 19, 2002, seeking to dismiss the Complaint for failure to state a claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6) and FED. R. BANKR. P. 7012 (making FED. R. CIV. P. 12 applicable in adversary proceedings). The Debtor asserts that the payments received from the Trusts are excluded from property of the estate pursuant to 11 U.S.C.A. § 541(c)(2) (West 1993) because the Trusts are spendthrift trusts, containing anti-alienation language.

In his Response to Motion to Dismiss filed on November 8, 2002,<sup>2</sup> the Plaintiff acknowledges the spendthrift nature of the three Trusts and argues that he is not seeking to recover the corpus of the Trusts, but instead, seeks the turnover of postpetition payments received by the Debtor, as property of the estate, from the Defendant trustees subsequent to the commencement

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<sup>1</sup> Since the postpetition income payments are alleged to have been paid to the Debtor, the court is unclear regarding the basis of the Plaintiff's claim against the Defendant trustees.

<sup>2</sup> Responses were due within twenty days after the Motion to Dismiss was filed. See E.D. TENN. LBR 7007-1. On October 9, 2002, the court entered an Agreed Order allowing the Plaintiff through November 8, 2002, to file his response to the Motion. The Defendant trustees have not responded to the Complaint or the Motion to Dismiss.

of the bankruptcy case. In the alternative, the Plaintiff asserts that he is entitled to recover the payments received by the Debtor from the Trusts within the first 180 days postpetition pursuant to 11 U.S.C.A. § 541(a)(5)(A) (West 1993).

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (E), and (O) (West 1993).

## I

When deciding a motion under Rule 12(b)(6), the court must “construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief.” *Bovee v. Coopers & Lybrand, C.P.A.*, 272 F.3d 356, 360 (6<sup>th</sup> Cir. 2001); *see also Prater v. City of Burnside, Ky.*, 289 F.3d 417, 424 (6<sup>th</sup> Cir. 2002) (quoting *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6<sup>th</sup> Cir. 1999), *overruled on other grounds by Swirkiewicz v. Sorema N.A.*, 122 S. Ct. 992 (2002)). Even though all factual allegations are accepted as true, the court “need not accept as true legal conclusions or unwarranted factual inferences.” *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 533 (6<sup>th</sup> Cir. 2002) (quoting *Morgan v. Church’s Fried Chicken*, 829 F.2d 10, 12 (6<sup>th</sup> Cir. 1987)). The complaint should not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Buchanan v. Apfel*, 249 F.3d 485, 488 (6<sup>th</sup> Cir. 2001) (quoting *Conley v. Gibson*, 78 S. Ct. 99, 102 (1957)).

## II

“The commencement of a case under section 301 . . . of this title creates an estate.” 11

U.S.C.A. § 541(a). The bankruptcy estate consists of, in material part:

(a)(1) Except as provided in subsection[] . . . (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

. . . .

(a)(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

. . . .

(c)(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C.A. § 541.

The Debtor is required to turnover all property of the estate to the Chapter 7 Trustee pursuant to 11 U.S.C.A. § 542. Likewise, if property of the Debtor is in the hands of custodians, such as the trustees of the Trusts in this case, the custodians are required to deliver the property, and any proceeds therefrom, to the Chapter 7 Trustee pursuant to 11 U.S.C.A. § 543(b).<sup>3</sup>

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<sup>3</sup> The Plaintiff’s action, however, appears directed solely to the recovery of postpetition payments made to the Debtor. *See supra* n.1. Section 543(b) would therefore seem to be inapplicable.

### III

The Debtor is the beneficiary under three *inter vivos* Trusts that pay him income and/or principal derived from the Trusts. The first trust was created by a Trust Agreement executed on November 26, 1979, for the benefit of the Debtor (the 1979 Trust). The grantor was the Debtor's father, John Douglas Jamison, and the trustees are George W. Cole and Donald Wiegel. The 1979 Trust provides for the payment of \$163.00 weekly to the Debtor during his lifetime for ordinary living expenses with payments to begin in February 1980. All additional disbursements are left to the sole discretion of the trustees. It also contains an article restricting alienation:

ARTICLE IV. RESTRICTION OR [sic] ALIENATION

With respect to both income and corpus, while the trust funds are held by the Trustees the interest of the life-time beneficiary of the trust hereby established shall not be anticipated, alienated or encumbered nor in any manner assigned or transferred by a beneficiary, nor shall be subject to legal process, bankruptcy proceedings, or the interference or control of creditors, spouses or divorced spouses, children, or others.

The second trust was created by an Irrevocable Trust Agreement executed on January 17, 1984 (the 1984 Trust). The grantor was John Douglas Jamison, and the trustees are James A. Harmon and William R. Brannick. The 1984 Trust provides that the trustees pay the net income of the trust to the Debtor in quarter-annual payments or more frequently at the trustees' discretion. This trust also contains the following clause regarding alienation:

ARTICLE IV.

A. The beneficial interests in the trusts created by this Agreement shall not be liable for the debts of any beneficiary thereunder; nor subject to seizure or attachment by any creditor of any such beneficiary while in the hands of the Trustee, and no beneficiary shall have the right to alienate, assign, dispose of or in any manner encumber his interest therein while in the possession of the Trustee. If a beneficiary shall alienate, charge, or dispose of his said income or right to

principal, or any part thereof or interest therein, or if, by reason of his bankruptcy or other event at any time happening during the continuance of this Trust, said income or principal otherwise intended for said beneficiary shall wholly or in part cease to be enjoyed by him as above provided, then in such event the trust hereinbefore expressed concerning said income and principal shall thereupon cease and terminate as to such beneficiary, and all income and principal otherwise hereinbefore provided for him shall thereafter be held and distributed by the Trustee in its absolute discretion, during the remainder of his life, for him, or to or for his issue or spouse or for their support, maintenance, health and education in such amounts as the Trustee shall deem fit and proper, having regard for the wishes of the Grantor as in this Agreement expressed, and retaining any unexpended sums as part of the principal of the trust to be finally disposed of after the death of such beneficiary as provided in Article III.

The third trust was created by an Irrevocable Trust Agreement executed on June 30, 1992 (the 1992 Trust). The grantors were John D. Jamison and Dorothy E. Jamison, and the trustees are Security National Bank and Trust Co. and William R. Brannick. The 1992 Trust provides that the trustees pay the net income of the trust to the Debtor in quarter-annual payments or more frequently at the trustees' discretion, along with any amount of the principal of the trust as the trustees deemed advisable for the Debtor's maintenance, health, and support. This trust contains the following clause regarding alienation:

#### ARTICLE II.

A. The beneficial interests in the trusts created by Article I shall not be liable for the debts of any beneficiary thereunder; nor subject to seizure or attachment by any creditor of any such beneficiary while in the hands of the Trustee, and no beneficiary shall have the right to alienate, assign, dispose of or in any manner encumber his interest therein while in the possession of the Trustee. If a beneficiary shall alienate, charge, or dispose of his said income or right to principal, or any part thereof or interest therein, or if, by reason of his bankruptcy or other event at any time happening during the continuance of this Trust, said income or principal otherwise intended for said beneficiary shall wholly or in part cease to be enjoyed by him as above provided, then in such event the trust hereinbefore expressed concerning said income and principal shall thereupon cease and terminate as to such beneficiary, and all income and principal otherwise hereinbefore provided for him shall thereafter be held and distributed by the Trustee in its absolute discretion,

during the remainder of his life, for him, or to or for his issue or spouse or for their support, maintenance, health and education in such amounts as the Trustee shall deem fit and proper, having regard for the wishes of the Grantors as in this Agreement expressed, and retaining any unexpended sums as part of the principal of the trust to be finally disposed of after the death of such beneficiary as provided in Article I.

#### IV

The threshold issue before the court is whether postpetition income payments from the Trusts to the Debtor become property of the estate pursuant to § 541(a). In order to determine if the postpetition income payments are excluded from the Debtor's bankruptcy estate under § 541(c)(2) as is argued by the Debtor, the court must first look to applicable nonbankruptcy law. *See Drewes v. Schonteich*, 31 F.3d 674, 676 (8<sup>th</sup> Cir. 1994). If the Trusts were intended to be spendthrift trusts and their formation complies with applicable state law, § 541(c)(2) applies, the restriction on the transfer of the Debtor's beneficial interest is enforceable, and the payments will not be included as property of the estate. *See id.* at 676-77.

The Trusts were all executed in Ohio, and thus, are subject to Ohio law. Under Ohio law, a spendthrift trust "imposes a restraint on the voluntary and involuntary transfer of the beneficiary's interest in the trust property." *Scott v. Bank One Trust Co., N.A.*, 577 N.E.2d 1077, 1081 (Ohio 1991). There are no "magic words" needed to impose a spendthrift trust; if a trust agreement either forbids or prevents alienation of the beneficiary's interest, and the grantor intended to forbid or prevent alienation, a spendthrift trust is created. *See id.*; *Scott v. Bank One Trust Co. (In re Baldwin)*, 142 B.R. 210, 213 (Bankr. S.D. Ohio 1992). Because the grantor of a spendthrift trust does not give the beneficiary an alienable interest, the beneficiary of a spendthrift trust does not

have an interest that creditors may execute upon. *Scott*, 577 N.E.2d at 1084. Here, the intent of the grantors is clearly discernable from the wording of the Trusts which restrict alienation and leave the distribution of funds to the trustees' discretion. Additionally, the Plaintiff does not seem to dispute that the three Trusts are valid, enforceable *inter vivos* trusts.<sup>4</sup>

The finding of a valid spendthrift trust triggers an application of § 541(c)(2). However, the issue of postpetition payments to the Debtor by the Trusts still remains. Under Ohio state law, once a beneficiary actually receives income from a spendthrift trust, that income is no longer protected by the spendthrift provisions of the trust and can be attached by creditors or can become property of a bankruptcy estate. *See Domo v. McCarthy*, 612 N.E.2d 706, 713 (Ohio 1993).

In *Domo*, the Ohio Supreme Court affirmed the decision of the appellate court, agreeing with the court of appeals' adoption of the following concept:

It would seem that to the extent spendthrift trusts are valid their protection should extend to the right of the beneficiary to receive income or principal from the trustee until it is *actually paid or delivered into the beneficiary's hands, and that trust income which is in the hands of the trustee awaiting payment should be affected by the restraint, whether the time for its payment has or has not passed.*

*Id.* (citing BOGERT, TRUSTS & TRUSTEES § 45 at 463 (2d ed. rev. 1984)).

“Generally, upon distribution, funds received by a debtor from a spendthrift trust are no longer subject to the anti-alienation clause of that trust.” *In re Schauer*, 246 B.R. 384, 387 (Bankr. D.N.D. 2000). Likewise, the *Restatement (Second) of Trusts* also states that “[a]fter the income of a spendthrift trust has been paid to the beneficiary it can be transferred by him and can be

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<sup>4</sup> The Plaintiff agrees that the estate is not entitled to receive the corpus of the Trusts, and accordingly, he does not seek to include the corpus of the Trusts as property of the estate.



reached by his creditors.” 5 COLLIER ON BANKRUPTCY ¶ 541.11[6][b] (Lawrence P. King ed., 15<sup>th</sup> ed. rev. 2002) (quoting RESTATEMENT (SECOND) OF TRUSTS § 152 (1959)); *see also Smith v. Moody (In re Moody)*, 837 F.2d 719, 723 (5<sup>th</sup> Cir. 1988) (“Neither the Texas Trust Code nor the applicable common law undertake to protect trust property from the reach of a beneficiary’s creditors once such property has been distributed to the beneficiary.”); *McCauley v. Hersloff (In re Hersloff)*, 147 B.R. 262, 266 (Bankr. M.D. Fla. 1992) (“Although the future right to receive income periodically from the trust is protected by the spendthrift provision, once income is received by the beneficiary . . . , that income is no longer protected by the spendthrift provision under Maryland law.”). Accordingly, once the Debtor actually receives payment of the income from the Trusts, it is no longer encumbered by the spendthrift provisions of the Trusts.

However, “the voluntary and involuntary restraint or alienation of the right . . . to receive . . . [assets of a spendthrift trust] is effective until the principal is *actually transferred* by [the trustee] to [the beneficiary].” *Domo*, 612 N.E.2d at 713 (emphasis in original).

[T]he question [is] what “the individual [property] owner” actually *owns* as the beneficiary of a spendthrift trust. The beneficiary owns no greater interest in the trust property than the settlor has given him. In the case of a spendthrift trust, the settlor has not given the beneficiary an alienable interest.

*Scott*, 577 N.E.2d at 1084 (emphasis in original); *see also Domo*, 612 N.E.2d at 713. In Ohio, the beneficiary of a spendthrift trust “has no interest that can be executed upon, because the trustor did not give him such an interest.” *Scott*, 577 N.E.2d at 1084. Similarly, the creditors of a beneficiary of a spendthrift trust “may collect from any property he *has*, including whatever interest he has in the trust property. But [he] has no greater interest in the trust property than the trust agreement gives him.” *Id.* at 1083 (emphasis in original).

Here, the trustees of the Trusts were in possession of the Trusts' funds at the commencement of the Debtor's bankruptcy case. The trustees were given the sole discretion as to whether to make disbursements to the Debtor. These funds were protected by the spendthrift provisions of the Trusts "until [they were] *actually paid or delivered into the [Debtor's] hands, [including] that trust income . . . in the hands of the trustee awaiting payment . . . , whether the time for . . . payment has . . . passed.*" *Domo*, 612 N.E.2d at 713.

Accordingly, because the Debtor had no interest or entitlement "as of the commencement of his case" to the payments received postpetition, "the broad provisions of section 541(a)(1) of the Bankruptcy Code do not apply." *Schauer*, 246 B.R. at 387. Because the postpetition payments are not brought into the bankruptcy estate by § 541(a)(1), the court must consider the Plaintiff's alternative argument that the payments became property of the estate by virtue of § 541(a)(5), allowing the Plaintiff to recover the postpetition income payments received by the Debtor from the Trusts during the 180 days following the commencement of this bankruptcy case. *See id.*

## V

Under § 541(a)(5)(A), if the income from the Trusts was received "by bequest, devise, or inheritance," it becomes property of the estate and subject to turnover to the Plaintiff. *See* 11 U.S.C.A. § 541(a)(5)(A).

The Bankruptcy Code should be interpreted as to the "plain meaning" of its provisions, and narrow construction should be given to the wording chosen by Congress. *In re Crandall*, 173

B.R. 836, 838-39 (Bankr. D. Conn. 1994) (citing *United States v. Ron Pair Enters., Inc.*, 109 S. Ct. 1026, 1030-31 (1989)). Section 541(a)(5)(A) limits the types of after-acquired property included within a debtor's bankruptcy estate to that received "by bequest, devise, or inheritance." It is incumbent upon the court to interpret § 541(a)(5)(A) as Congress intended; *i.e.*, by the plain meaning of the words chosen.

The Seventh Edition of *Black's Law Dictionary* defines these terms as follows: "Bequest. 1. The act of giving property (usu. personal property) by will. 2. Property (usu. personal property other than money) disposed of in a will." BLACK'S LAW DICTIONARY 152 (7<sup>th</sup> ed. 1999). "Devise. 1. The act of giving property (usu. real property) by will. 2. The provision in a will containing such a gift. 3. Property (usu. real property) disposed of in a will. 4. A will disposing of real property." BLACK'S LAW DICTIONARY 463 (7<sup>th</sup> ed. 1999). "Inheritance. 1. Property received from an ancestor under the laws of intestacy. 2. Property that a person receives by bequest or devise." BLACK'S LAW DICTIONARY 787 (7<sup>th</sup> ed. 1999).

The court agrees with the Seventh Circuit that "Congress listed the specific interests to be included as property of the estate [pursuant to § 541(a)(5)(A)]. Those interests do not include a category into which an *inter vivos* spendthrift trust may fit." *Magill v. Newman (In re Newman)*,

903 F.2d 1150, 1154 (7<sup>th</sup> Cir. 1990). It is clear to this court that by choosing the specific terms listed in § 541(a)(5)(A), and not including others, Congress only intended to include postpetition or after-acquired property received by a debtor in a testamentary or intestate nature, *i.e.*, property received stemming from the death of another person, as property of the bankruptcy estate. Clearly, *inter vivos* trusts are not testamentary.<sup>5</sup> See also *Magill v. Newman (In re Newman)*, 99 B.R. 881, 884 (C.D. Ill. 1989) (“There is no indication in [§ 541(a)(5)(A)] that Congress intended these terms to have anything but their normal and accepted meanings.”); *Schauer*, 246 B.R. at 388 (“[D]istributions from an *inter vivos* trust do not qualify as bequests, and § 541(a)(5)(A) does not operate to bring such distributions into the bankruptcy estate.”).

In support of his argument, the Plaintiff cites cases in which courts included income payments from trusts under the umbrella of § 541(a)(5)(A). See *Moody*, 837 F.2d at 723-24; *In re Hunter*, 261 B.R. 789, 792-93 (Bankr. M.D. Fla. 2001); *Hersloff*, 147 B.R. at 266-67; *Togut v. Hecht (In re Hecht)*, 54 B.R. 379, 383-84 (Bankr. S.D.N.Y. 1985). Additionally, the court acknowledges that other courts have included trust income within the purview of § 541(a)(5)(A). See, *e.g.*, *Lonstein v. Rochman (In re Lonstein)*, 950 F.2d 77, 78 n.1 (1<sup>st</sup> Cir. 1991); *Richardson*

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<sup>5</sup> In fact, the Plaintiff concedes that even though the Trusts are not testamentary, the income payments are covered by the *Webster's New World Dictionary* definition of bequeath, which reads “(1) to leave property to another by last will and testament, and (2) to hand down; pass on.” WEBSTER'S NEW WORLD DICTIONARY 131 (3d college ed. 1988). The court does not find a clear distinction between this definition and those in *Black's Law Dictionary*, nor does the court agree that the *Webster's New World Dictionary* definition encompasses the income payments from the three *inter vivos* Trusts.

*v. McCullough (In re McCullough)*, 259 B.R. 509, 521 (Bankr. D.R.I. 2001); *Farmers Coop. Co. of Rush Ctr., Kan. v. Timken State Bank (In re Pechanec)*, 59 B.R. 899, 903 (Bankr. D. Kan. 1986); *Gordon C. York, Inc. v. Kragness (In re Kragness)*, 58 B.R. 939, 944 (Bankr. D. Or. 1986). However, with the exception of *Moody*, these cases can be distinguished from the present case because they involved testamentary trusts.<sup>6</sup> Conversely, in cases involving *inter vivos* trusts, the courts found that § 541(a)(5)(A) did not apply. See *Schauer*, 246 B.R. at 388; *Crandall*, 173 B.R. at 839; *Newman*, 99 B.R. at 884, *aff'd by Magill, supra*; *Kragness*, 58 B.R. at 944.<sup>7</sup>

There are no additional sections of the Bankruptcy Code that allow postpetition income to be brought into a Chapter 7 bankruptcy estate.<sup>8</sup> Because § 541(a)(5)(A) does not apply to the three *inter vivos* Trusts at issue in this case, and the postpetition income payments received by the Debtor from the Trusts are excluded as property of the bankruptcy estate, the Debtor's Motion to Dismiss must be granted.

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<sup>6</sup> The Fifth Circuit did not state whether the trust at issue in *Moody* was testamentary or *inter vivos*. The court does not, therefore, find *Moody* persuasive on this issue. Nonetheless, regardless of what type of trust existed in *Moody*, this court is convinced that the very language of § 541(a)(5)(A) precludes its application to *inter vivos* trusts.

<sup>7</sup> Three trusts were at issue in *Kragness*, two of which were testamentary and one which was *inter vivos*. The *inter vivos* trust did not fall within the scope of § 541(a)(5)(A).

<sup>8</sup> In contrast, 11 U.S.C.A. § 1306 (West 1993) specifically states that, in Chapter 13 bankruptcy cases, "[p]roperty of the estate includes, in addition to the property specified in section 541 of this title (1) all property of the kind specified in such section that the debtor acquires *after the commencement of the case . . .*" (emphasis added).

## **VI**

The Plaintiff has not stated a claim upon which relief may be granted. Accordingly, the Debtor's Motion to Dismiss will be granted. An order consistent with this Memorandum will be entered.

FILED: November 26, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

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Defendants

**ORDER**

For the reasons set forth in the Memorandum on Motion to Dismiss filed this date, the court directs that the Motion to Dismiss filed by the Defendant John Dale Jamison on September 19, 2002, is GRANTED. The Plaintiff's Complaint filed July 25, 2002, is DISMISSED as to this Defendant.

SO ORDERED.

ENTER: November 26, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE